No. 3542

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and *Prochein Ami*, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON CO., a corporation, ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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Proctors for Appellants.

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Appellees.

REPLY BRIEF FOR APPELLANTS.

I. AS TO APPELLEES' STATEMENT.

1. The statement that

> "It is without dispute that chain slings were on board the vessel in addition to the rope slings used" (3)*

is incorrect.

The testimony shows that chain slings were used when the lumber was *loaded* (12).

There is no evidence that the chain slings used in *loading* lumber belonged to the ship or remained on board. Assuming that the vessel was provided with chain slings, it would have been obviously fitter, cheaper and safer to use them than rope slings, which wear out; the fact that insufficient rope slings were used when the fatal accident occurred justifies the inference that any chain slings used in *loading* were provided by the loading mill, and were not on board this vessel. The mate laid out the slings which he found on board, and which the court below found insufficient; of course the men picked out the particular slings from among those provided by the vessel; but the testimony showed, and the court found, that respondents failed to *provide* slings long enough for a double turn.

2. The statement that

> "As the vessel was at the time lower than the wharf, it is evident the load *never cleared the vessel*" (4)

is incorrect.

*Pages refer to Brief for Appellees.

The load was hoisted from the deck to the level of the wharf. The master's story is:

> "And everybody was out of the way, all walked away, and the load *swung in to the wharf.* When it *came in to the wharf* the donkey man didn't let it go; he could have let it go, but he kind of held on, *and the load swung back* * * *" (24)

It therefore appears from the testimony of the only eye-witness produced by respondents that the load, after having been raised from the lower level of the deck to the higher level of the wharf, *"swung in to the wharf",* and that the dangerous situation did not *begin* until then, *"when it came in to the wharf".* He testifies that afterwards, for a reason specified by him, "the load *swung back".* It appears clearly that, after it had swung back, some of the load *fell into the water.* This, of course, happened, *before* it had *returned* to the deck.

How is it possible for respondents to assert, in the face of their own evidence, that "the load never cleared the vessel"?

II. AS TO CONTENTION BASED ON CALIFORNIA STATUTE OF LIMITATIONS.

In the course of the trial appellees marshaled every technical doctrine of the common law (assumed risk, not pleaded; fellow servants, not pleaded; contributory negligence). Two new defenses appeared at the hearing in this court, no previous hint having been given either in the pleadings or at the trial. The first of

these alleged defenses is that the libelants have no cause of action because their action was not commenced within one year. The second alleged defense is that the court has no jurisdiction, the deceased having died on shore.

As to the latter defense, we understand that it was abandoned at the oral argument, at the suggestion of the court. It is settled that the *locus injuriae* is the locus of the jurisdiction.

As to the first alleged defense, a sufficient answer is that it comes too late. It was not pleaded by respondents. During the long course of this litigation respondents have admitted right along what they now deny, viz: that it was incumbent upon them to make a defense to libelants' action. Is it not too late now to say that libelants have no good cause of action?

However, it is not necessary to travel outside Appellees' Brief to prove that there is no merit in the contention. The contention rests upon a quotation from *Hughes on Admiralty* which maintains that the alleged restriction of the right to sue is binding in admiralty courts only in that type of legislation where it is "*embodied*" in the state statute based upon Lord Campbell's Act (5) and is "a *condition* on which the right is given" (6). Mr. Hughes recognized expressly that the rule referred to is different in that second type of cases where the restriction is contained in "*a statute of limitations*"; that, in the latter case, admiralty courts are not bound. His comment is founded upon the *Stern* case, of which the New Jersey statute forms

the basis. The latter statute contains a *proviso in the body of the Acts* "provided that every such action shall be commenced within twelve calendar months"; it therefore belongs to the first type. The same is true of the statute in the "Harrisburg" case. Mr. Hughes' criticism of the *Garcia* case, decided by this court, is predicated upon the reservation: "unless the California statute differs from the usual form of *these* statutes." Now, Mr. Hughes' opinion would not be the law of this court even in case he differed; but in fact he does not differ; for the California statute does differ from the type to which his remarks are directed. The limitation of one year is not a proviso of the death statute, C. C. P. Sec. 377; it is found in an entirely different section of the code, C. C. P. Sec. 340, the general statute of limitations. Mr. Hughes could not say: "This is not a statute of limitations"; he would agree: "This *is* a statute of limitations, and therefore my remarks do not apply to it or to any case based upon it."

On principle the situation under the California statutes is this:

Section 377 gives the right of action without condition.

Section 340 provides: If you desire to enforce this right of action in a California court, you must commence suit within one year.

This leaves it open to parties who have the right under Section 377 to enforce the right in a court of admiralty, which is not bound by the State statute of limitations. Excellent reasons are given by this court

in the case of *Western Fuel Co. v. Garcia,* 255 Fed. 817, 820, for its decision that the statute of limitations has no application.

The suggestion of appellees that the court postpone the decision of this case until the United States Supreme Court decides the *Garcia* case (7) is in line with other endeavors to secure delay. While appellees could only gain by such a course, it might work irreparable hardship upon appellants by the possibility of the decease of responsible appellees and the consequent abatement of appellants' action against them. It appears that the question here raised was not certified to the Supreme Court at all, and that, therefore, no light will be thrown upon it, presumably, by the eventual decision in that court. Under the circumstances it would, in our opinion, be in consonance with principles of justice to have this case take its regular course under the law as it now stands.

III. AS TO THE EVIDENCE (9-14).

The District Court has found that respondents failed to provide slings long enough for a double turn. This court, we are confident, will not be inclined to disturb this finding.

Respondents' witnesses Fitzgerald and McDonald were San Francisco stevedores who knew nothing of the facts of this case, but were called as *"experts"* to show that rope slings were "usual and customary". Even if their testimony is accepted, it shows at best

what the custom was at San Francisco, but does not show what was "usual and customary" at San Pedro, the place where James Flynn was killed. The third stevedore who was called as an expert by respondents (McPhee, Apostles p. 176) testified, in answer to the leading question asked by counsel for respondents, as follows:

> "Q. In regard to the method of discharging lumber by means of a rope sling, state whether or not, in your experience, as far back as 1903, it was usual and customary to discharge lumber with a single turn as well as with a double turn.
>
> A. *No, I don't think it was.* I always used double turns" (Ap. pp. 176-177).

This during an experience of twenty years.

In spite of this testimony by his own expert counsel states:

> "It is undisputed that rope slings were in common use, and that a single turn, in the discharge of lumber cargoes, *was usual*" (22).

Counsel's comment upon Baker's testimony (13) as to single turn slings is obviously unfair, as the record shows. Baker sums up his views as follows:

> "A. My candid opinion is that it is not a safe way and if it was my vessel I would make them take two turns.
>
> Q. Your reasons for that are what?
>
> A. I think it is not safe—the lumber is apt to slip out" (Ap. p. 123).

IV. AS TO CONTRIBUTORY NEGLIGENCE.

The master's version of the accident is alone sufficient to exonerate the deceased from this charge. Coun-

sel in this connection refers to Cainan's testimony (25), apparently intimating that it would aid appellees' theory. But this testimony confirms clearly the master's version. He recites that, after the load had been hoisted high enough and come back, "it struck the stringer of the wharf."

In answer to Mr. Frank's question he testified as follows:

> "Q. Now, as I understand you, this *had passed clear over the vessel and over to the wharf*, and *then struck the wharf* and most of the load fell in between the wharf and the vessel into the water?
> A. Most of the load fell between the wharf and the vessel's side" (Ap. p. 64).

Nevertheless counsel now argue that "it never was clear" of the deck (25).

When Flynn returned to his work

> "he was there because his employment required it; and that he believed himself safe is manifest from the fact that he was there. Men do not voluntarily incur unnecessary risk."
>
> (Butler, J., in *McGough v. Ropuer,* 87 Fed. 535.)

V. AS TO ASSUMPTION OF THE RISK (16-24).

The answer to appellees' argument on this point is:

(I) This defense is not pleaded.

(II) Assuming it to apply, the deceased had *not* agreed to assume the risk of having loads come back to the deck after they had swung on to the wharf.

There is no evidence that such a risk was apprehended by the deceased or could have been reasonably anticipated.

(III) Judge Dietrich found that "the long timbers slipped out *after* the load had reached the wharf railing, a casualty which is not shown by the evidence to be of frequent occurrence." In fact there is no evidence that the casualty of timbers slipping after the load had reached the wharf railing was a danger to be apprehended by the men on board. They had a right to feel safe at the time.

(IV) There is no evidence that the protests made to the officers as to the single turn were known to deceased. Even if this particular risk was appreciated by him, it had terminated as a risk to be anticipated after the load had swung out to the wharf. The instant case is different from *The Scandinavian,* cited by respondents (19-20), where libelant took chances on using a ladder which he *knew* to be broken and dangerous. Flynn did not know that the fatal load would return to the deck after it had passed to the wharf.

VI. AS TO THE FELLOW-SERVANT DEFENSE.

This defense, like the preceding one, is an after thought.

(I) The defense is not pleaded.

(II) On the contrary, the respondents, in their answer, "deny that the *officers or agents* of said vessel

in charge of the hoisting of said lot of lumber from said hold were careless or negligent in the manner of hoisting the same, or in the means employed by them for so doing'' (Answer X, Ap. p. 17). Respondents are therefore estopped from now claiming the contrary.

(III) Assuming negligence of the mate, such negligence was not the causa causans of Flynn's death. That cause was the breach of ''the non-delegable duty of the respondents to take reasonable care in providing safe appliances'' (187). It was still operating as the efficient cause at the time when the mate ''held on'' and the bundle, in consequence thereof, struck the railing of the wharf. Judge Dietrich found that ''it is difficult to see how such an accident could have occurred if the double turn had been employed'', and that ''failure to provide slings long enough for a double turn constituted negligence'' (188).

In *The Joseph B. Thomas,* 81 Fed. 578, Judge Morrow said:

> ''It is also another rule of the law of negligence that the employer is liable for the *concurring* negligence of himself and a fellow servant of the injured employe to the same extent *as if the injury had been caused entirely by his own negligence.* * * * The same rule prevails in admiralty.''

It may be said in passing that the last cited case involves principles very similar to those involved in the instant case; that these principles are very thoroughly discussed in that case and have been followed by other courts. The instant case falls plainly within the class of cases referred to by Judge Morrow, ''where

the act of injury itself, in connection with other facts and circumstances, sufficiently establishes that there was negligence to justify a judgment for damages.'' The unloading is shown to have been under the management of appellees or their servants, and the accident was such as, in the ordinary course of things, does not happen if ordinary care is used by those having the management.

The *Thomas* case also affords support to appellants' argument that the failure of appellees to call as witness the mate raises a presumption that his testimony, if produced, would have been unfavorable to appellees. He represented the appellees directly in the discharge of the lumber; all the evidence shows that he was the chief actor in the drama; that he had been warned

> ''that somebody would get killed here yet with the slings. 'Oh!' he said, 'there are a lot more of Dutchmen! They killed an Irishman for a change'' (Deposition of Ehlert, Ap. p. 79).

VII. AS TO DAMAGES (31-40).

Appellees' contention is that the damages contended for by appellants are *''grossly excessive''* (32); that appellants are entitled to the ''cash value'' (33) of the life of the husband and father at the time when he was killed by the negligence of appellees; and that, ''under the facts of this case, and the principles announced by the court in its opinion, $2500 would be a large amount'' (40). Before discovering the cases cited in their brief, appellees had urged upon Judge Dietrich the suggestion that he follow the analogy of

the cases in the courts of the State of California; finding afterwards that the "cash value" of a human life in California is so much higher than the $2500 which "would be a large amount", appellees are silent as to the California decisions. We have no fear that the judgment of this court in favor of this widow, whose struggle, single-handed, for her own and her children's existence did not allow her time to attend to her law suit until after the children were all self-supporting, will be on the basis of a niggardly "cash value" of the life of her dead husband, even though he was merely an humble laborer, gaining a modest livelihood for his family.

VIII. AS TO PROPORTIONATE LIABILITY OF PART OWNERS (40-43).

Appellees' argument overlooks the fact that *prima facie* each appellee is liable, as part owner of the vessel, for the failure to supply safe or proper slings. The statute limiting his liability applies only *in the absence of knowledge or privity* on his part. To support a claim for the benefit of the statute, the *burden of proof is upon the appellee* claiming it, to show that he was without privity or knowledge in the matter. It is not incumbent upon the appellants to show that each appellee had knowledge.

IX. AS TO THE MASTER AND E. A. CHRISTENSON.

(a) *As to the master:* Judge Dietrich found that this is a case

> "where the *master is negligent* and continues to require the use of an inadequate or defective appliance after its insufficiency has been called to his attention" (Ap. 188).

This finding is supported by the evidence. Contrary to counsel's assertion (45), the name "Hansen" *is* "the earmark that indicates that he (Buckley) *did*" speak to the master whose first name was "Hans".

Mr. Christenson's deposition, taken pursuant to the order of this court, shows that the master is Hans J. Lunvaldt, one of the respondents, and was the owner of 2/32nds of the schooner at the time of the accident (Deposition of E. A. Christenson, p. 2).

(b) *As to Mr. Christenson:* Mr. Christenson testified that he was managing owner of the schooner until March 3, 1903 (p. 4). That, on the latter date, he sold his remaining interest to Sudden & Christenson, a corporation, of which he was president (p. 5). He was also owner of 50% of its stock (p. 6).

His contention that he was *not* managing owner of the vessel on August 3, 1903, the date of the accident, rests upon his claim that he was then *not* an owner, having sold his interest to the corporation. It is submitted that he is estopped from making such a claim, for the following reasons: His name heads the list of respondents in the suit brought in 1903; this ordinarily indicates that he was the managing owner (Deposition, p. 10); the writ was served personally upon him (Ap. p. 3); respondents' answer is sworn to by him, "*for Self and Co-owners*" (Ap., p. 18; Deposition, p. 2).

"Q. Whose handwriting is 'E. A. Christenson, for Self and Co-owners'?
A. My handwriting.
Q. The whole, 'E. A. Christenson, for Self and Co-owners', is in your handwriting, is it not?
A. Yes.
Q. And you swore to this?
A. On the 13th day of May, 1905, yes."

The answer thus sworn to is styled: "The answer of E. A. Christenson", etc., and does not deny the allegation "that said defendants" (headed by E. A. Christenson) were joint owners of the schooner. Thereafter Mr. Christenson was present at the taking of the depositions of the sailors (Deposition p. 11), from which the inference may be drawn that he at any rate considered himself the managing owner of the vessel. In 1920 a decree, prepared by his counsel, was entered against the respondents, "E. A. Christenson, owner of 2/32", heading their list (Ap. p. 196). During seventeen years and down to October, 1920, Mr. Christenson had admitted that he was the owner of a 2/32 interest in this vessel and assumed the burden of such ownership.

We submit that he cannot deny ownership at this late date; that his function of managing owner continued to and beyond the date of the accident, and that he is *ipso facto* charged with the privity and knowledge of a managing owner.

His testimony also discloses that *Sudden & Christenson,* a corporation, were owners of a 2/32 interest in the schooner on the day of the accident (Deposition, p. 3). We submit that the final decree ordered by this

court should include this corporation as a respondent liable to libelants. The corporation still exists (id.).

It is further suggested that even under the theory that Mr. Christenson's interest passed to Sudden & Christenson before the date of the accident, the latter corporation became the managing owner of the vessel. Hence both the corporation, and Mr. Christenson as its president, were charged with the privity and knowledge which prevents any limitation of liability in their cases.

Dated, San Francisco,
February 16, 1921.

Respectfully submitted,

Andros & Hengstler,
Louis T. Hengstler,
Proctors for Appellants.